UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM D. SMITH,

Plaintiff.

v. Case No. 15-10288
Hon. Laurie J. Michelson

MELANY GAVULIC and
HURLEY MEDICAL CENTER,

Defendants.

_____/

DEFENDANT'S MOTION FOR PROTECTIVE ORDER

BEFORE MAGISTRATE-JUDGE ANTHONY P. PATTI
United States District Court
Monday, July 27, 2015

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Detroit, Michigan
July 27, 2015
10:03 a.m.
(The transcriber was not
present at this hearing)
THE CLERK: United States Court now calls 15 dash 10288, Smith versus Gavulic.
MR. PELTON: Good morning, Your Honor. It's Eric Pelton on behalf of the defendants.
THE COURT: Good morning, Mr. Pelton.
MR. PELTON: I think this has been well briefed and I don't want to belabor what's in the briefs.
There's, I think, three or four things I want to highlight very quickly. The first that the Michigan rule on this issue is quite explicit.
The only exception for a former general counsel or former attorney of a client to reveal client confidences and privileges is a fee dispute which isn't at issue here or to defend against wrongful conduct.
Michigan, as we outlined in our brief, intentionally departed from ABA rule that would allow use in prosecuting civil claim.
THE CLERK: Your name again?
MR. PELTON: Eric Pelton.

The second point I want to make in response to plaintiff's arguments is we're not seeking dismissal of his case, at least at this point, because we're not sure what he is using to support his claims.

We've not taken his deposition yet and we want to get this issue resolved before we do and have a protocol set up for privilege issues.

But just suppose he's having a conversation with the CEO, Defendant Gavulic, in the context of a race litigation case. And the CEO is sharing ideas and asking questions and he construes something she says as racial, that would be a privileged conversation, I think.

Or maybe there's disagreement in how to handle a particular piece of litigation. He goes to the board, and then claims she retaliates these are privileged conversations. But we don't know that until we find out what the basis of his claims are.

So, at this point, we're not seeking dismissal, we're only seeking an order that would provide protections for the attorney-client privileges and confidences that we fear may come up in this case.

I think the Supreme Court of California in the *General Dynamics* case summarizes this point very well 876 Pacific 2d 487.

And at 503 to 504 they make this very point. It would be a rare instance where you would dismiss a case on the pleadings, but it really depends on the context of the case and context in which the privileges may arise. So it's yet to be determined.

But what we do seek at this point is an order that would protect our privileges and client confidential information.

The third point I wanted to make, again in response to their brief, is that were not seeking to preclude Mr. Smith's use of confidential information in response to the after-acquired evidence of the defense, again, one of the exceptions under Michigan.

Case law is to defend against allegations of wrongful conduct that's likely to come up in the law is to defend against allegations of wrongful conduct that's likely to come up in the after-required evidence defense and he would be able to use client confidences and attorney-client privileges to defend himself from that claim.

I don't think it's going to be much of an issue here, but the point is, it's a narrow and limited ability to use that on points that bear directly on the activities that are alleged to have been misconduct.

And then the final point I wanted to make is we've made suggestions in the last part of our opening brief on what the order might look like and what it needs to contain.

I want to raise a couple of more points, I'm not sure, we either didn't put in the brief or didn't suggest at the time.

One is that we need time to designate. So, for example, we might be in a deposition, a privilege issue comes up. We would probably make a separate record, but we may miss something.

And I think they're ought to be a period of time, 21 days or something after receipt of the transcript for us to declare that something is, is attorney-client privilege and discuss it with, with Mr. Lenhoff and Mr. Freifeld.

This is a hugely important issue because we just received about a 2500 page document production and it appears at first glance that many of the documents in their privilege communications, communications with outside counsel, there's communications with the CEO concerning active litigation, these would be privilege communications.

We would need time, the order to provide us with time to designate, wait a minute, that's privileged. It

shouldn't be used and you need to protect it under the order.

So I'd suggest, you know, 14 or 21 days a reasonable amount of time to declare that after receiving a dep transcript or after receiving documents in a case.

The second part of the order I wanted to, to add is that it should preclude plaintiff, Mr. Smith or his counsel, from using these client confidences and privileged information in any other matters.

I've become aware that there's at least two -- I think one or two other cases in which Mr. Lenhoff's office represents clients against Hurley Medical Center.

And I think Mr. Smith and Mr. Lenhoff -- I'm not suggesting they would do this intentionally, but they certainly need to be careful about using any confidences they learned in this case in these other matters.

And then the rest of the information I think we've provided in the back of our initial brief as to what ought to be contained in their order provided in the report.

THE COURT: One thing you didn't mention was for which would typically be in a protective order is what to do at the end of the litigation.

Typically, either you have to destroy materials or return materials, give some certification as to what happened to the materials that are subject to protective order.

So, presumably, if I were to enter a protective order, that would be yet another term that are you ought to be added. Correct?

MR. PELTON: Absolutely. And I guess we, we -- maybe we should have attached a proposed order, we didn't. Yeah, that's absolutely routine in those kinds of orders to protective privileges. We would need that here. We'd be happy to submit an order if that would be helpful to the Court.

THE COURT: Now I did look at your affirmative defenses, which I hold up. And your after-acquired evidence of affirmative defense, which I've no doubt is plead in good faith, but it kind of looks like the typical after-acquired evidence affirmative defense. It's not very detailed, but it's simply says that after-acquired evidence could preclude future damages or whatever.

My understanding from reading the briefs is that -- and I think this actually came from the plaintiff's brief where they attached some communications that you had that, as of now, that relates specifically to an

issue of whether the plaintiff was properly scrutinizing the bills of a medical malpractice defense firm.

MR. PELTON: That's correct.

We sat down with Mr. Lenhoff and Mr. Freifeld actually prior to a mediation to discuss this defense and try to explain it to him.

We then provided them with documents we felt were relevant in advance of a private mediation that we did. And so I think they're fully appraised in that right now. That is the issue, there may be others but, you know, they're still investigating somethings.

THE COURT: Obviously, the nature of after-acquired evidence is at some point down the line you might find something else and you'll assert it under that same --

MR. PELTON: That's true.

THE COURT: -- but as of now, that's what we're talking about.

MR. PELTON: That's what we're talking about. The issue -- the issues really come full circle.

Because the outside counsel who represented Hurley in the medical malpractice cases that we say were mishandled has now sued Hurley claiming they're not paying his fees, which would be one of these exceptions.

So I think a lot of that may come out in that case and the privileges are going to probably evaporate over that specific set of issues.

That's why I mention I don't think it's going to be a major contention in this case, but it's something we certainly need to be cognizant of.

And, again, to the extent Mr. Smith wants to use that to reveal any client confidences, again, it's got to be construed narrowly and only go to that allegation or that activity where he's alleged to have mishandled.

THE COURT: As I read that allegation, it didn't not appear that the plaintiff repeatedly says that you're making ethical accusations against him, it did not appear that you were accusing him of violating the rules of ethics but, rather, accusing him of incompetence or failure to be diligent, but not necessarily of dishonest conduct, let's say.

MR. PELTON: That's, that's correct. I think it can be viewed as a -- as -- you know, some of the cases point this out.

As a general counsel, you have a counseling role as a lawyer and often you also have a business role and you have a business hat on.

At this point, I would say it appears that it was just not well handled as a businessman as an executive

of the company.

Whether it goes beyond that, we have not filed and ethical charge. I'm waiting, I think, to hear his explanation in a deposition before we make that determination.

But I would say, based on what I've seen so far, we'd certainly give him the benefit of the doubt that this was really poor management.

THE COURT: I think going forward and I believe the plaintiff will agree with this because he wore two hats; one is a hat as I guess as an officer as a managerial role, another hat is attorney. This comes up any time a lawyer wears those two hats.

There's probably going to be some question going forward as to which communications are, in fact, subject to the attorney-client privilege and which are just part of his role as part of the management.

MR. PELTON: That's absolutely right. And that's what I mentioned, I think that's discussed in some of the cited cases.

That's why I hoped to have a protocol where we can sit down and talk about these things; and if we can't resolve it, we'd have to come to the Court. But it needs be kept under seal until that determination's made.

THE COURT: Anything further?

MR. PELTON: I have nothing further unless the court has any questions.

THE COURT: Not at this time. I'd like to hear from the plaintiff.

MR. PELTON: Thank you.

THE COURT: Mr. Lenhoff.

MR. LENHOFF: How are you, Your Honor?

THE COURT: Fine. How you are you?

MR. LENHOFF: Fine. Just a couple significant points I'd like to make.

First of all, I think the Court's instincts as to that last point are right on, in the sense that as a general counsel, as a general counsel of a corporation, it's a different role then as attorney for a single plaintiff. And there would be quiet a bit of different work determining what is privileged.

We've cited to that *Kachmar* case, Third Circuit case, that may made that observation. In that case, the Third Circuit made the observation that it's, it's just -- it's just difficult, it's just difficult sometimes to ascertain what is administrative and what is not with respect to the -- with respect to a general counsel.

Just a quote for a moment the *Kachmar* case.

THE COURT: What page are you quoting from? I have I copy of it here.

MR. LENHOFF: Page 181 dash 182.

MR. PELTON: I'm sorry. Which case is it?

MR. LENHOFF: *Kachmar*, the Third Circuit case.

THE COURT: *Kachmar v Sunguard* 109 F.3d 170, Third Circuit 1997.

You're at page 181 you said?

MR. LENHOFF: 181-182.

THE COURT: I got it. Thank you.

MR. LENHOFF: It says here in the opinion:

> It's premature at this stage of the litigation to determine the range of evidence Kachmar will offer and whether it will implicate the attorney-client privilege.
>
> For example, without deciding the substance of the issue, it's difficult to see how statements made to Kachmar and other evidence offered in relation to her own employment would implicate the attorney-client privilege.
>
> It is also questionable whether information that was generally observable by Kachmar as an employee of the company, such as her

observation concerning the lack of women in a Sunguard subsidiary would implicate the privilege.

There may be a fine but relevant line to draw between the fact that Kachmar took positions on certainly legal issues involving Sunguard's policies and the substance of her legal opinion.

Where that point is particularly significant is the proposed protective order that the defendant's cite.

You see, one point that -- I thought the briefs were very good, but one point I don't think was brought out is there is a protective order already in this case.

May I approach the bench?

THE COURT: Well that's, that's something new to me. I didn't realize that and I didn't scrutinize the entire record to see that, but if you have a copy -- is that copy for me?

MR. PELTON: Not with me, but I'm generally familiar with. Thank you.

(After a short delay, the proceedings continued)

MR. LENHOFF: This protective order, after considerable negotiations, was entered on May 22, 2015, signed by the Court on that day.

Interestingly, it brings up that issue the Court did of the determine of confidential information at the end of the case. It's also allows a wide range of documents that it doesn't make confidential.

And provides here -- while this order that is now before you, Your Honor, doesn't dispose of the issue for you today, the plaintiff's counsel is free, on page nine, Your Honor, of the order, plaintiff is free to argue that this protective order should bear on Rule 1.6 issues. That, of course, would be the ethical Rule 1.6.

See, today, the defendant would have this Court make a sweeping substantive rule in its proposed order -- in his proposed order in the defendant's brief.

This is the first position defendants asked this Court to enter.

> Smith should be forbidden by default from disclosing Hurley's contents and secrecy to any person using Hurley confidences and secrets, including disclosure for offensive use and support of his liability.

Now that is inappropriate, Your Honor, at this point. We would agree -- we've already agreed to return confidential materials.

We would agree that any information we learn of in this case, any information that's within the scope of

the attorney-client privilege, to not use it in successive cases.

Yes, I do have other cases against Hurley. I would pledge and enter into a stipulation to refrain from using that information in any other Hurley case.

THE COURT: That language is already contained in this particular order, that's docket entry number 13, right?

You already have such a provision that you can only use confidentially designated information in this case, not in other cases, right? That would a be standard provision. Is it in here?

MR. LENHOFF: Right. Is it in here?

THE COURT: I'm sorry. It's nine pages long. I'm not a speed reader.

MR. LENHOFF: I know it is. Well, I think inferentially it is because it prohibits the plaintiff from this closing information to all but a specified subset of people, set out at pages three and four.

But to the extent it's not adequately treated in this order, I would agree to it. I would agree to it.

But as far as an order at this time prohibiting the plaintiff from using any Hurley confidences and secrets in support of his liability claims offensively, I don't think that's appropriate.

Contrary to what Mr. Pelton just said, I don't think the Michigan ethical rule's clear on this, just doesn't really speak to it, interestingly, and then it, it would be impractical, also.

We do have an ethics rule that we cited, this District of Columbia case which actually speaks of a lawyer's claim against the employer client for a discrimination case like this.

THE COURT: What struck me about that ethics opinion from D.C. is the language where it says:

> If the employer or client puts the lawyer's conduct at issue, however, it lodges an affirmative defense or counterclaims.

That would seem to be right on point.

> The lawyer may disclose or use the employer's confidences or secrets insofar as reasonably necessary to respond to the employers/clients contention.

So it seems to be quite limited, limited, first, to the affirmative defense as opposed to an offensive use as you're proposing.

And, second, to be limited in that context to as reasonably necessary or insofar as reasonably necessary.

So it seems to me it is, even under the D.C. ethics opinion which is persuasive at best, quite limited.

MR. LENHOFF: Well -- I know the Court's --

THE COURT: Goes on to say on a need-to-know basis. You cited the New York case.

MR. LENHOFF: Right. Well, I don't have a problem with the reasonably necessary language in there. But in an employment discrimination case, I mean they're going to -- we'll -- we have a whistleblower claim, discrimination claim, retaliation claim.

We will put our case in that he was a good employee and the like and in defending the -- defending the *prima facie* case, we are certain the defendant will, will argue, in this case they will argue the plaintiff was not performing competently. Of course, there's an affirmative defense, too.

So we clearly would be able to use privileges in that context. I think just under the Michigan rule because the Michigan rule provides that confidences and secrecy can be used with respect to rebutting charges of, of improper conduct by the lawyer or wrongful conduct by the lawyer.

The problem with the Michigan rule, Your Honor, is it just doesn't speak to this issue of what can be disclosed in an attorney in a general counsel's employment discrimination case against the corporation.

THE COURT: What it does is it says the general rule is you can't disclose, then it has exceptions. And the exception would -- and I think this is conceded by the defense here, would cover your affirmative defense.

But by implication when you have a general rule, that's the default position. And then if you've got an exception, which apparently you do to the extent you're dealing with his affirmative defense the after-acquired, because it accuses you of or your client of, if not unethical conduct, but I don't think it accuses your client of unethical conduct, but some lack of diligence, let's say, which could be construed as wrongful conduct it would fit. But the rule doesn't give you any kind of exception for a claiming that you're making.

If you look at, and I suggest you do, the comments to the rule, and this is under a section within the comments that say dispute concerning lawyer's conduct, it says:

> In any event, the disclosure should be no greater then the lawyer reasonably believes it's necessary to vindicate innocence, the disclosure should be made in a manner which limits access to information to the tribunal or other persons having a need to know.

Which would seem to be the kind of thing you do in a protective order.

Quote: And appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Then the next paragraph says, quote:

If the lawyer is charged with wrong doing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge.

Such a charge can arise in a civil, criminal or professional disciplinary proceeding, can be based on a wrong allegedly committed by the lawyer against the client.

So I look to that because one of the questions I had in my mind was could this be used outside a disciplinary proceeding.

I wondered where it says wrongful conduct did it mean under the rules, in other words, before the Attorney Grievance Commission.

The comment I think makes it clear that, no, that's not the limitation, because it says it could be done in a civil case, which is what you have here.

When I put all that together, it's quite difficult for me to see the plain language of the Michigan rule, regardless of what any other rules outside of Michigan or any other cases interpreting those rules say.

The Michigan rule does not seem to give your client the ability to use confidences or privileged information -- privileged communications, rather, in support of his affirmative offensive claim of employment discrimination. I'm not really sure, quite frankly, that you need them to prove your case.

I mean you've talked about the *Battle* matter and while there are no doubt privilege communications involving that matter, they're no doubt public information in that matter you can use in support of your claim or certainly will attempt to.

This isn't a motion to dismiss your claim, I think it's overbroad to say that. And I don't think the rule, unless you can show me otherwise, it doesn't make an exception for a claim made by your client, it only makes an exception for a claim made against your client or an allegation made against your client.

MR. LENHOFF: Can I respond?

THE COURT: Yes, please.

MR. LENHOFF: First of all, I think certainly within the exception of the concept of the plaintiff not

only being able to respond to the after-acquired evidence argument, but also be able to respond to their affirmative defense.

We put in the *prima facie* case. They will then say he just was not competent, he wasn't performing his job properly.

Now in order to show that that's pretense and one way of showing pretense is that the legitimate non-discriminatory reason lacks a basis in fact or is inconsistent with their policies. That is something which certainly is (inaudible)

We're responding in a civil context to an allegation of wrongful conduct. So I just want to make it clear that it's our position that this right to respond to allegations of wrongful conduct is -- we cite is broader then merely responding to affirmative -- merely responding to the after-acquired evidence rule.

And we cited that *Golden District Court* case out of California which says that an employment discrimination case, the allegation that the plaintiff was -- that there was a legitimate non-discriminatory reason is an affirmative defense.

So, clearly, we think we responded to that as well as the after acquired evidence argument.

Now a couple more points, Your Honor. I do think it's important to make it clear that information that's already generally accessible to the public is not within the scope of confidence.

For example, hasn't been mentioned, wasn't mentioned by Mr. Pelton and I don't know that it was clear in the briefs, this is a public hospital. A lot of this information is obtainable under FOIA in Michigan.

In fact, this *Tonya Battle* case that was a case in which a patient at Hurley stated he didn't want an African-American nurse treating his child. It became a cause celeb all over the country.

THE COURT: Was a deposition taken?

MR. LENHOFF: Yes.

THE COURT: Was it sealed?

MR. LENHOFF: Not to my knowledge.

THE COURT: You can use all that, right?

MR. LENHOFF: Yes, I think you can.

THE COURT: Right? Probably in the court record. So that's my point.

My point is, I mean, you'll see it as the case unfolds, but I don't think that your in ability to use confidential communications, attorney-client communications and privileged communications in support

of your employment discrimination claim is preclusive of the claim necessarily.

MR. LENHOFF: Also, the plaintiff's October 2014 complaint to the board of -- Chair of the Board of Managers -- and that's an important element of proof in this case, I think that would be obtainable under FOIA in this case involving a public sector defendant.

And one of the arguments we make quite strongly is this complaint was made on October 7, 2014. In that complaint, Mr. Smith said that he felt he was being discriminated against so to speak.

He felt he was not being treated fairly with respect to not only his position that Haitians could not dictate the race of treating personnel, but, also, he felt that an African-American female should have been hired as a staff at Hurley and was not.

Now he stated all of this in a complaint to Mr. Bekofske, the Chief of the Board of Management at Hurley. And I mean that, that presumably would be obtainable under FOIA.

And you see, I worry, too, with respect to what's privileged and what's not privileged.

THE COURT: Anything that's under FOIA -- anything that would have to be under the FOIA statute I

think cuts against his argument that it's privilege and your argument that you need it for the privilege, right?

The more it's under FOIA, the less you need it as a matter of attorney-client privilege, right?

MR. LENHOFF: I would think something's available under FOIA, *ipso facto*. It's just no argument at all we can use it in this case.

THE COURT: About whether it's, in fact, available under FOIA, because the statute has its own limitations as well, which are sometimes asserted.

But assuming that it is, legally, you're entitled to something under a FOIA, but that's cutting against the argument you're making today which is it's extremely important that you have privilege information and be able to use it in order to successfully prosecute your employment discrimination claim.

Be that as it may, we're stuck with the rule, like it or not, there it is 1.6. It says what it says.

MR. LENHOFF: It does, but it just doesn't speak to this kind of case. This kind of case -- it's a different case.

That case speaks to a situation where an attorney is representing one or two or three or several clients. I don't think it speaks to -- doesn't speak to an employment discrimination case.

THE COURT: It could have said -- he could have made an exception to an employment discrimination. He didn't do that.

He could have made an exception for wrongful discharge, could have said except when you brought a case against them.

But what it says it's limited in the offensive conduct to -- well, it could have, right?

But what it says is it's limited in the offensive conduct to fee disputes.

MR. LENHOFF: And wrongful conduct.

THE COURT: No, doesn't say and wrongful conduct, it says to defend the lawyer against an accusation of wrongful conduct.

So it's got to be an offensive position in that context or could be used offensively to establish, which is an offensive word, to collect a fee which we all agree this is not a fee collection case.

And it's hard for me to get around -- I realize it's not a published opinion by the Michigan Court of Appeals, but the Court of Appeals had a case that looked an awful like a fee collection case.

But the plaintiff's counsel, for whatever reason, decided to do it under something that it said that's not a fee collection case. You can't use it.

MR. LENHOFF: That's not a case like this at all. I know the case you're talking about cited by the defendant.

THE COURT: It would suggest to me at least the Michigan court's interpreting their own rule of professional conduct are very narrow about what they will allow.

MR. LENHOFF: Let me just say this.

THE COURT: Sure.

MR. LENHOFF: I don't think -- I don't think that they said that. First of all, it's unpublished.

THE COURT: I get that.

MR. LENHOFF: Second of all, really --

THE COURT: They had Doug Shapiro on that panel. I mean he's not exactly a bleeding heart for the defense.

MR. LENHOFF: That is a fair statement. But that, that case -- I mean that was a case in which a law firm was essentially bringing an action to collect fees against the client to get -- to obtain their fees against the bankrupt client. That was the motive of that case, wasn't a case involving racial discrimination or a whistleblower case.

So, I mean, just for two reasons I don't think that is a persuasive case. It's completely dissimilar from

this case.

THE COURT: It's all we've got interpreting this rule, right?

MR. LENHOFF: It's weak.

THE COURT: It is what it is.

MR. LENHOFF: They're other Michigan cases. There's that *Moran* case, that's a *Toussiant* case that doesn't deal with this issue.

We did not find any Michigan cases on dealing with this issue, so I think -- but that fraudulent conveyance act case certainly should not be what the Court uses. It's just too different.

I just think at this stage when really we haven't done any depositions in this case. We have -- discovery doesn't end until early next year, it's in the early stages. I just think it's just too early to enter this type of order.

And then I also think it's really going to be as to determining what's privileged and what isn't privileged.

THE COURT: I give you that. I think this case, depending on how much information we're talking about, we don't even know that. But if there's a lot of this information that we're taking about, then we're going to have -- it's going be a tedious task.

Because, first, we're going to have to determine whether it's even attorney-client communication, which first of all many people don't know what that is. They think everything you say to a lawyer and what a lawyer says back to you is a protected privilege. Not so.

There's a definition of law. Roughly the definition is it's seeking -- getting legal advice, so there's that question. And there's going to be a question of which hat he was wearing during these commmunications.

Then there's also a question of for what purpose is it being used that is in the offensive or defensive conduct. I have some suggestions how we can deal with that.

MR. LENHOFF: That second point now the Court's dealt with two or three times, what hat was he wearing; legal advisor, administrator, manager or legal advisor. It's important. It's a significant point.

THE COURT: Just suppose Mr. Pelton will say no, he said he was a manager.

MR. LENHOFF: I guess someone will have to figure that out.

As to the rest of their protective order, they set up a system where the defendant has too much control. We have to submit documents to the defendant.

To the extent Smith believes they need to reveal Hurley confidences and secrets in response to the after-acquired evidence defense, we should be required to submit those to Hurley's counsel, then Hurley or Mr. Pelton decides whether or not we can go forward with this. I object to that.

So, basically, I think to the extent the Court is going to rule on this issue, I guess you are, it's before you, I ask -- respectfully request that the Court be particularly careful regarding this issue of which hat, whether this governs statements and information that Bill Smith learned as an advisor or as a manager as opposed to an attorney.

And then I also think that it's got to be clear that any order dealing with defensive use doesn't apply to the after-acquired evidence or most significantly in responding to their defense in the whistleblower and the employment discrimination case.

In other words, they will bring up Mr. Smith was apparently not performing competently in order to attack that to show so that it's pre-textual. We have a right to respond to that.

As the Court pointed out, it is a civil allegation of wrongful conduct.

THE COURT: What you're saying is there's

wrongful conduct asserted in the affirmative defense and there's also wrongful conduct asserted in the primary defense.

MR. LENHOFF: Right. Right.

THE COURT: Right, as the reason for the discharge. Whereas the affirmative defense doesn't deal with the reason for the discharge, just deals with cutting off the spigot on damages.

MR. LENHOFF: Exactly. Exactly.

We're entitled to use confidential information as to both of those issues; both the damages after-acquired evidence and to liability defense.

THE COURT: Okay. Now, obviously, I can't rule perspectively on this distinction between which hat he's wearing, that's going to come up with each communication individually; that's too perspective at this point.

MR. LENHOFF: I know that, but I, but I -- to the extent you're going to write on this, it sounds like you are.

THE COURT: Maybe; that's an evolving question as I sit here.

MR. LENHOFF: Well, it's an interesting question. I can tell by how well prepared the Court is today based on these --

THE COURT: I have a question for you, though. And this was raised in the reply brief and it already struck me before it was raised in the reply brief.

But how is the *Battle* case at all necessary for you to prove your claim of discrimination?

MR. LENHOFF: The plaintiff went to Hurley and told Hurley that it should not engage in discrimination with respect to nurses.

In other words, the plaintiff went to Hurley and said you cannot do what this man wants you to do, what this man with the Swastika wants you to do, he wants you to not assign people like *Tonya Battle*, black nurses, to treat this child. You can't do that.

THE COURT: I see an objection.

MR. PELTON: I'm not sure where Mr. Lenhoff's going with this but it sure sounding like it could get into privilege communication.

He's talking about what Smith advised the medical center. I don't even know what the CEO's reaction to that was. This is exactly the kind of thing we have to be very cautious about.

THE COURT: Mr. Lenhoff, can you state it very generally, since we don't have an order yet, about sealing this record.

MR. LENHOFF: Look at Plaintiff's Exhibit 1. That is the complaint. The chair of Hurley Medical Center dated 10-7-2014 --

THE COURT: Got it.

MR. LENHOFF: It is mentioned in here. (inaudible) (inaudible).

THE COURT: Okay.

MR. LENHOFF: Now our contention in this case is going to be Mr. Smith objected to the race based assignments, one of the reasons why he was fired. That's part of our whistleblower claim.

Under the whistleblower statute, when a public entity is a defendant, an intracompany complaint constitutes going to a public agency under the WPA.

THE COURT: There's also something on pages five through six April 2014. I presume that's part of what you're claiming?

MR. LENHOFF: That's correct.

THE COURT: Okay.

MR. LENHOFF: And this is what I mean about Mr. Pelton seeking to cripple our liability case.

THE COURT: That's not before me. This isn't a motion to dismiss.

MR. LENHOFF: But he wants you to determine the evidence in all of our claims.

And it's especially preposterous in that this wasn't a complete (inaudible) Board of Managers regarding the -- (inaudible) doesn't deal with -- it deals tangentially with what Mr. Smith's position was on legal issues.

But this is why not only is the *Battle* case relevant very important and what really makes this whole argument just really difficult to accept is how widely publicized this case was. It was -- it was a national cause celeb.

THE COURT: I understand that, but the cases you cited, I looked at them. I looked at the California case, I looked at the Third Circuit case.

There's another one I looked at as well, and what struck me, first of all, is that those are generally distinguishable because they're motions to dismiss, they dealt with issues whether you state a claim or not which is not what's before me.

But all those cases seem to suggest as pointed out in the reply brief, in fact, there are times when you may not be able to get everything in you want because the privilege, if not sacrosanct, very important and we don't allow privileged information out except in very narrow circumstances.

I think of it in analogously to when the federal

government prosecutes a criminal case and the only way they can prosecute that criminal case is to use things that are considered national security secrets. And sometimes they have to drop their prosecution because they have to reveal things that cannot be revealed in court.

Isn't that the case at least to some extent? I mean assuming that parade of horribles were to happen here, you could not prove your case without using information which is prohibited by the Rules of Professional Conduct.

Aren't people who are attorneys sometimes in that unfortunate position, just like the government is in the unfortunate position being unable to prosecute someone because they can't reveal security secrets?

MR. LENHOFF: I don't think it's that similar. This is a case in which plaintiff allegedly was fired for protesting against racial discrimination.

Plaintiff contends a substantial reason he was fired is because he went to the CEO and told the CEO that it was improper for Hurley to make race-based assignments. And that --

MR. PELTON: Again, I'll object. I don't know the context of that conversation. We don't know if it's privileged conversation.

I have to say this is going way beyond what's probably necessary for the limited ruling we're seeking today.

THE COURT: Is that your complaint, Mr. Pelton? You've got a retaliatory discharge, I assume?

MR. LENHOFF: Yes, Your Honor. The complaint is exhibit --

THE COURT: I've got the complaint in front of me.

MR. LENHOFF: Beginning paragraph 15 a number of occasions plaintiff complained -- beginning at paragraph 15:

> On a number of occasions, plaintiff complained that defendant was engaged in racial discrimination.
> Paragraph 16. April 2014, defendant refused to allow plaintiff to hire an African-American female for a staff attorney position at defendant Hurley.
> In October 2014, plaintiff filed a complaint pursuant to defendant Hurley's Executive Employee Relations Policy with chairman of the Board of Managers.
> In the said October 2014 complaint, plaintiff stated defendant engaged in racial

discrimination.

Paragraph 19: Plaintiff's 2014 complaint plaintiff cited plaintiff's opposition to defendant's mishandling of neonatal intensive care unit race discrimination matters involving (inaudible).

THE COURT: Okay.

MR. LENHOFF: So -- and it's interesting we put this in the complaint.

Mr. Pelton didn't object to it now. I don't know why he's getting up and objecting to it now. These are at the heart of our whistleblower and retaliatory discharge claims.

THE COURT: Okay. But looking at paragraphs 15 to 19 of your first amended complaint which I have before me, for example, paragraph 16 refusal to hire an African-American female staff attorney doesn't seem to have anything to do with attorney-client privilege, it has to do with a staffing decision within the hospital which would be in his managerial role.

MR. LENHOFF: True.

THE COURT: Okay?

And if he made a complaint pursuant to the Executive Employee Relations Policy -- I'm not going to rule on that right now, but that doesn't necessarily

imply that there's attorney client communication.

What I'm wondering is why would you need attorney-client communication? Don't tell me what they are right now, but why would you need them?

MR. LENHOFF: Well, also, also in paragraph 19 -- 18 and 19 in the said October 2014 complaint, plaintiff stated that defendant engaged in racial discrimination.

THE COURT: That was in his employment complaint, that's not attorney-client communication.

MR. LENHOFF: I assume you feel same way -- true.

Then in October 2014, plaintiff said defense mishandled the race discrimination matter.

THE COURT: Again, in an attorney complaint, not attorney-client communication.

It seems you're laying out your case right here without using any attorney-client communication, it appears.

But that's my -- which gets back to my question why would you need it? I don't think you're allowed under the rule, but let's just -- for sake of argument I don't understand why you need it.

MR. LENHOFF: What's -- what's -- well, I'm pleased that the Court made the statements you just did

because it's clear to me that the complaint to Mr. Bekofske and the opposition in the staff hiring of Miss Dennings (ph.) we're not even arguably within attorney-client.

THE COURT: It's not a ruling, it's an observation. It's, obviously -- that issue can come before me later but just looking at how you plead it, it appears that you're not pleading communications, you're pleading employment related managerial related stuff.

I don't see anything in these paragraphs that says advice was sought, advice was given in that context. I don't see that here.

So why would we need to go there? At least that, at first blush, looks that way. I'm not ruling on that.

MR. LENHOFF: I understand. I guess, I guess, Your Honor, the task before this Court is, you know, to craft, to craft an order that, that accommodates the confidentiality interest but does not derogate from the interest of this plaintiff to assert a racial discrimination and whistle blower retaliatory discharge.

THE COURT: I'm not ruling on a motion to dismiss.

So, you know, I look across at plaintiff's counsel table, they're both skilled attorneys. I suspect they're going to be able to -- I won't say whether

you're going to survive motions or not, that's not before me.

But I suspect that you will be able to continue to prosecute this case as successfully as you're going to be able to prosecute it without using attorney-client communications. That's, that's just an observation not a ruling.

MR. LENHOFF: Let me see.

(After a short delay, the proceedings continued)

Any other questions for me, Your Honor?

THE COURT: Well, it's interesting because I wrote down in my notes after reading your brief, but before reading the reply brief, need to shut the barn door before the horses get out. And lo and behold, I read in the reply brief that exact expression.

It strikes me that it doesn't do you any harm to have a protective order in place so that we can deal with these issues prospectively rather than wait for these communications to come out. They're out there.

And we'll deal with them retroactively is never a good idea when you're dealing with confidential information, because then it's out. You can't put the horses back in the barn or snakes back in the can, whatever expression you want to use.

So that does strike me that why not have a protective order? Your brief, while I realize that your primary position is we don't need a protective order, you then take the alternative position, as good lawyers do, that I realize you might see it differently, Your Honor. And, okay, we do a protective order, but let's just do it differently then the way Mr. Pelton says.

But my question is -- really gets back to your first argument. Why not? I mean it seems to me if we let the horses out of the barn, they're out.

I'm sure you can appreciate Mr. Pelton's position trying to protect information. You can't wait until it's out there.

MR. LENHOFF: But I -- I mean I respect Mr. Pelton, I think he's a fine attorney, but there's an element of tactic in this motion not merely protecting confidences.

There's an element in this motion which the defendants are seeking to undercut the substantive claims here, so I do believe there's a tactical element here.

I am not adverse to a protective order given that there's a policy and procedure for everybody as to how we resolve this.

I think, given there's a dispute, we should be able

to bring it straight to the Court, straight to you.

THE COURT: Let me make a suggestion and this is more of the Court thinking out loud for a minute.

Assuming I enter a protective order and you may then come back with various communications, ask for *an in camera* inspection or ruling, and that's fine, but -- and I don't want to know how many communications we're talking about; maybe talking about a little or a lot, the Courts fine with that.

But if we're talking about a lot, at some point it becomes burdensome to the Court to have you keep coming back to this box of 4000 communications. I don't know what's it's going to be.

The alternative is to take it piecemeal, which is, let's see how much there is. If the volume is going to be much, would be for the Court to appoint a special master, someone everybody could agree to. I can think of some experts, I'm sure you can, who can then review that report.

But I don't want to punt it to a special master if it's not a lot we're talking about, may not know. But I'm curious to throw that out there for both sides or at least put it in the back of your heads.

MR. LENHOFF: Well, we, really don't know how many communications are at issue, I mean.

Given that this administrative attorney distinction is respected, given that the FOIA distinction is respected, given that the complaint's being totally usable are respected, there may not be that many communications. So --

THE COURT: I wonder that myself sometimes in Sicilian culture, (inaudible) sometimes making a mountain out of molehill. But I don't think Mr. Pelton's making a mountain out of the fact that attorney-client communications are important.

He's got a duty to his client to protect them, keep them from getting out there, at least circumscribed, but we may not be talking about that much.

MR. LENHOFF: This is a very serious matter. I had an orange for breakfast so the reference to Sicilian culture (inaudible).

THE COURT: There's that same thing he plays for his grandkids. (Inaudible)

MR. LENHOFF: The orange. Michael sits at this little chair. He has an orange, then he dies.

THE COURT: I think I'll avoid oranges for a while.

MR. LENHOFF: Even the assassination --

THE COURT: He's at the fruited cart, right?

MR. LENHOFF: So, geez, I did have an orange

for breakfast but --

THE COURT: You feeling okay?

MR. LENHOFF: Yes. That's true we may be making --

THE COURT: (Inaudible)

MR. LENHOFF: Perhaps. Perhaps.

THE COURT: Good luck to the person who transcribes the transcript.

Thank you, Mr. Lenhoff.

Mr. Pelton, I know you're dying to respond. I have two questions right off the bat.

MR. PELTON: Sure.

THE COURT: I was unaware of the other protective order and so I guess I need to understand why the other protective order that's in existence already, docket number 13, doesn't cover this situation?

What do we need to add?

MR. PELTON: Because it says it doesn't. This is part of the problem. I really appreciate Mr. Lenhoff. He's a top flight attorney, absolutely first rate. I thought the discussion right now is very illuminating.

But I do think there's a parade of horribles that don't exist. We do have to be vigilant and protect the privilege.

This is the kind of discussion when we tried to work out this order. You can see in paragraph 15 it ends up punting. We couldn't come to agree on it. The parties dispute what extent such disclosures are authorized in this case.

THE COURT: So you left it to another day. I got it.

MR. PELTON: Then we filed our motion.

And so I think the Court really asked a good question of Mr. Lenhoff; and that is, what's the harm.

It occurred to me suddenly not only is there no harm to Mr. Lenhoff or Mr. Smith, it, in fact, protects them because I don't believe Mr. Smith or Mr. Lenhoff unwittingly reveal a confidence. And so this type of order can be in place to protect them.

And I hear a tinge of Mr. Lenhoff's concern that we're going to, you know, over do it or over, over designate or something.

But let me just point out that the complaint that's been discussed here is attached to the brief. We've produced it. Why didn't try to designate it as confidential. We didn't claim it was privileged.

There are some attachments that we claim is privileged and produced in a privilege log, but not the complaint itself.

So we're going to proceed in good faith and if we don't, we'll hear about it from this Court. So I think we simply need this procedure set up. I'm confident that the Court fully understands this.

Again, I think the California Court captured it well on 503 and 504 of the *General Dynamics* opinion:

> Whether the privilege serves as a bar to plaintiff's recovery will be litigated and determined in the context of motions for protective order or compel further discovery responses as well as at the time of motion for summary judgment.

It is premature to make any of those kinds of rulings now, we just need the framework within which both parties are going to work and which protects, I think, Mr. Smith from revealing confidences he shouldn't.

So the only other point I wanted to make is in addition to the -- I think it *Chaban* or c-h-a-b-o-n unpublished Court of Appeals' opinion you and Mr. Lenhoff discussed, there is the history of the rule itself.

In the separation it took from the ABA rule that I think clearly states what Michigan's intent was with respect to this rule.

And while it could lead to some harsh results in certain kinds of cases, it is a difficult balance, but it's a balance the court has to strike.

The First Circuit's opinion in *Siedl*e I think talks about that balance, but also talks about how sacrosanct the privilege is. That's part of what goes along with being an attorney, whether in-house or outside of counsel.

So I don't think I have anything else to respond to again unless the Court has any other questions.

THE COURT: I have one other question.

Mr. Lenhoff said if we focus on the affirmative defense of after-acquired evidence which just deals with cutting off damages.

But Mr. Lenhoff has said that in giving a reason -- that isn't your primary defense to his claim, giving a reason for the discharge, you also you either are or he presumes will be pointing to his wrongful conduct or not doing his job properly.

There's got to be -- we know about the burden shifting in employment cases, right? He makes his prima facie case. If he makes it successfully, you have to come up with a legitimate reason.

When you give that legitimate reason, doesn't that come under the exception under 1.6 of the Michigan Rules

of Professional Conduct? Not just the affirmative defense, but if you're accusing him of --

MR. PELTON: It's a question of whether a charge of alleged misconduct is made in articulating our non discriminatory or non retaliatory reason which is not an affirmative defense, it's a burden shifting, but we only need come forward with a reason.

Yeah, I mean if Miss Gavulic in her testimony opens that door and cites to something privileged, it's waived right.

So, again, as the *General Dynamics Corp* says, it depends on the context. I fear we will have to be back in front of you to make those determinations or maybe we can work through them ourselves. I do want to say one other thing.

There is -- I mentioned this early on. We did get a big stack 2500 pages of documents. It appears a considerable number of those are privileged. I don't know that they're particularly relevant. And it's not an issue for today, it's something we need to talk about.

THE COURT: Is there anything you can designate as privileged under the existing protective order?

MR. PELTON: We can designate them as

confidential.

THE COURT: Right, as confidential, on the basis of privilege is what I mean.

MR. PELTON: I suppose we could. But then we're required, under 10, to seek an order pursuant to Rule 5.3 that it's confidential in order to file it under seal. So I think we're trying to get beyond that.

I don't think this order quite gets us there. You might be able to amend it or supplement it or something with a few paragraphs but --

MR. LENHOFF: Your Honor, I object. He's bringing up issues that were not in the motion in rebuttal to this issue of this document response.

I didn't have a chance to respond to that, so I object to it. It's not before you.

MR. PELTON: I said it's something we would have to work out. I just wanted to give the Court a sense there could be a substantial amount of information. It's something we, we --

THE COURT: I don't think there's anything unfair about that, Mr. Lenhoff.

MR. PELTON: I'm not casting aspersions at all, it's something we have to talk about. We agreed we would do that.

So I don't apologize that I was arguing for something I'm not. I'm not looking for any sort of direction or ruling on it.

THE COURT: I think I'm clear with the narrow scope of what I have to rule on is.

Okay. Anything further?

MR. PELTON: No, Your Honor. Thanks very much.

THE COURT: Thank you.

I think I'm going to proceed a little bit in unusual fashion because I want to make some general comments about what I think are the issues before the Court and where I think the law takes me.

But then I want to discuss with you, because I do think, for starters, that we need a protective order in this case that addresses this since it does appear in paragraph 15 of the existing protective order, which is docket number 13, that the parties punted on this issue because they couldn't work it out. I get that. That happens.

You agree to what you can agree to, you put that in and you leave the other issues for another day. But today's the other day.

So I'm going to give you my thoughts and observations so you know what my mind is on these

issues.

But then the question will be at the end, after I've said what I'm going to say, whether you really want the Court to go back in chambers and write your protective order or whether you think that you can, in light of my rulings, put together one jointly.

And it doesn't need to be a stipulated protective order. If you want to take exception to it, fine. But if you think you can make a protective order that reflects my rulings, I'd rather have one that you two work out in the nature of protective orders. You have to deal with them over and over again, it's better if you can work it out then if you can't. Obviously, if you can't, I'll just draft it, but neither side may like what I draft, so you have more control you draft it.

Usually I draft my own orders, but in this case after all I say, I think you can then decide which direction you want to go. But careful what you ask for if you want me to draft it, because you may not like it.

So first, first of all -- and this motion is not about the dismissal of plaintiff's claims or his right to bring this lawsuit.

And for that reason, I find many of the cases that were cited by the plaintiff which affirm other jurisdictions, really all of them, not on point because

it seems to me that the major cases that you cited were in the context of ruling on the pleadings and those cases use language such as at the *demurer* stage and many states still use that language, and they are clearly looking at the adequacy of pleadings, they're talking about whether dismissal can occur. And that's not what's before me. They seem to sort of peripherally talk about privilege.

So, for example, the *Kachmar* case v *Sunguard Data Systems*, which is the Third Circuit case 109 F.3d 173, the Court of Appeals holds:

> That the former employee stated *prima facie* case of discrimination --
>
> So it's a *prima facie* case issue.
>
> The possibility that retaliatory discharge claim would implicate a communication.
>
> Subject to communication did not compel dismissal in that case.
>
> And the duty of confidentiality under Pennsylvania's rules of conduct did not preclude a retaliatory discharge claim.

Well, nobody's saying or I don't that the duty of confidentiality precludes handling a discharge claim.

But, in and of itself, it may be difficult, more difficult, perhaps, to prove a discharge claim because

of those rules, but the rules are what they are.

And I gave the analogy to the situation with the government's trying to prosecute a claim that can't go forward with it because of the need to use privilege information or national security to protect their information. That is possible, but we don't know that to be the case here. This is not a motion to dismiss.

And even, as I walked through the complaint with Mr. Lenhoff, it would appear that even in his complaint which the defense agrees does not reveal privilege communications, seems to be able to, you know, work through a case whether that's a suspicious pleading or not that's not before me, even there doesn't seem to refer to privilege communication, so that's not an issue here.

Second, the parties both seem to agree that the Court should play some role in balancing the right to litigate against the protection of attorney-client communications.

Mr. Lenhoff and his team agree that attorney-client communications are something that is important to protect and they understand that.

And I think on the other side the right to litigation is respected as well. That's the balancing act for the Court. The cases cited by both sides talk

about that balancing act and that's what the Court has to do.

Third, and I said this during the argument, but I'll say it again, I do not see the defendant's accusing the plaintiff of unethical conduct. In fact, I concede that they're not but, rather, of perhaps incompetence or lack of thoroughness as to a particular issue involving the scrutiny of medical or bills from a medical malpractice law firm. For whatever that's worth, I make that observation.

I do think that much of what goes on here does necessarily stray into the realm of hypothetical and premature as the plaintiff's has pointed out, but as I also mentioned from the bench, I do think it is important to close the barn door before the horses get out because in the nature of confidential communications, privilege attorney-client communications, once they're out they're out.

So I don't think that having a mechanism in place to protect their disclosure is problematic, I think it's actually a good thing.

Actually, I agree with the defense that it's not just a protection to Hurley, it's actually a protection to the plaintiff, because he's an attorney.

And without a mechanism in place, via protective

order, he will be proceeding at his risk to reveal things that may or may not be privileged, but it would be at his risk as to whether they are privileged whether they're permitted to be revealed. And once he does, he'll subject himself to the potentiality of disciplinary proceedings brought by Hurley.

So I think it's to the advantage both sides, is my point, to have a mechanism in place and protective order in place.

Both parties -- another observation. Both parties appear to agree that some disclosure may be made subject to the after-acquired evidence, affirmative defense and as we heard in oral argument, I think the parties are in agreement that if wrongful conduct is at issue, even in the burden shifting analysis, is that is in the defendant's articulation as to the reasons for the discharge, that those communications can be used in that context under Michigan Rule of Professional Conduct 1.6.

So it's to the extent he's defending against a charge or a defense or an affirmative defense of wrongful conduct, that is the exception under which it would be permissible under Rule 1.6.

Both parties seem to recognize the appropriate use of protective order in the circumstances. Indeed, the cases cited by the plaintiff all talk about protective

orders, protective measures, sealing documents and so forth.

And I think the parties are in agreement certainly the cases cited by both parties indicate that a mechanism to seal such communications, if they're privileged, is also important.

However, such communications need to be limited to exactly what it says in the rule, which is specifically to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct. That's the actual language in Michigan Rule of Professional Conduct 1.6(c)5.

The parties agree that the first exception which is confidences or secrets necessary to establish or collect a fee are not implicated here because this is not a fee collection case.

I might point out that subsection a of the Michigan Rules of Professional Conduct 1.6 gives a definition of confidence and secret, although the definition of confidences, and I quote, refers to information protected by the client that are privileged under applicable law. So that basically gets us to the Rules of Evidence and to some extent to common law.

I already did during oral argument but the commentary is also helpful to -- in the Rule 1.6,

particularly the section that's entitled dispute concerning lawyer's conduct. But I already quoted it into the record, so I won't requote it.

I don't see as another observation how the *Tonya Battle* matter fits within the exception under Michigan Rules of Professional Conduct 1.6(c) 5. I don't see how it is implicated in defending a lawyer, the lawyer's employees or associates, against accusations of wrongful conduct.

Obviously, if the plaintiff somehow can show that later in that context, the context of either dealing with an affirmative defense or dealing with the burden shifting reasons for the discharge, if somehow the reasons for the discharge involved the *Tonya Battle* matter, that could be revisited.

But as of today, I don't see any showing that the *Tonya Battle* matter can be used in any other context then the proof of the plaintiff's offensive claim of discrimination.

That's not say that that matter can't be used in a matter which doesn't utilize attorney-client communications and privileges protected by the rule as stated in the complaint and conceded by the defendant, I believe in this argument.

There's information out there that's, you know, public and is outside the context of attorney-client communications.

As Mr. Lenhoff conceded in oral argument, there's somethings he may be able to obtain through FOIA through public records, court records and so forth.

But I don't see how attorney-client communications involved in the *Tonya Battle* matter can be -- are necessary or, quite frankly, even if they are necessary, how they are anyway excepted from the Rule 1.6.

Under Rule 1.6, on its plain language, I don't think that attorney-client communications and privileges that are subject to that rule can be used in support of plaintiffs offensive claims of discrimination.

I did mention earlier that *in camera* review approaches -- is one approach. The Court is willing to undertake the *in camera* review as necessary going forward.

My concern is that if we're talking about a lot of the material, the Court will be overburdened. If we're talking about the Court hearing from you every two weeks with another document or receiving five, 10,000 documents to look at, then I think we need to be thinking about a special master who can look at things and report on them to the Court.

But since we don't know at this point the scope, I think any protective order should include an *in camera* review provision with the understanding that the Court may revisit that and appoint a special master later should that become overburdensome on the Court. I think that language should be included in an order.

I agree with the argument made in the defendant's reply brief that the -- this was at page -- it's actually docket entry 17 and it's page six under the page assignment system given by our computer system as opposed to page six that the plaintiff wrote on his actual brief or defendant in their reply brief.

But I agree with the defendant that the plaintiff confuses the distinct concepts of ethical rules do not forbid bringing the suit, they don't, but ethical rules forbid bringing a suit, but they do limit the use of client confidences and secrets and I think that's an important distinction.

I already mentioned in oral argument, but it's an observation. We know that it's perspective as to any particular communication, but with each communication that you can't agree is or isn't privileged, we're going to have to look at, well, was it made with the plaintiff's hat as an attorney as opposed to managerial, was it given in the context of receiving or giving legal

advice, does it fit with then ambit of a true attorney-client communication.

I can't respectively rule on that, I don't even have a communication to rule on. But that's going to be something that's going to have to be looked at with each communication.

Hopefully, the first line of defense would be counsel discussing it. This is a provision I particularly liked in the professed language the defense suggests, which suggests if there's a question whether something's privileged, it should first be put to Hurley because Hurley got two choices.

Hurley can say, yeah, I agree with you, it isn't privileged, if there's a question, right?

Plaintiff can say here's a communication I think it's privileged. Hurley might say we agree, we don't think it's privileged. That's one way you avoid coming to court with it.

Or Hurley can have the option of waiting on privilege, it's their privilege to waive. And so that's a possibility. And if that happens, then you also don't need to burden the Court with it.

I think it's very important you have that communication with each other first and you reveal what you're seeking to disclose or use to the party that

holds that privilege to Hurley first before you come to the court. When you two can't agree, then you come to the Court, I think you know that.

The Court should be a last resort not the first and its -- the defendant has to be preliminary given the -- preliminarily given the opportunity to waive the privilege or agree something's not privileged or to agree to some mechanism for its use that it's going to occur.

I was struck by the language in the *General Dynamics* case which was fairly heavily relied upon by the plaintiff.

This is the Supreme Court of California case which is the 876 Pacific 2d. 487 California 1994.

And in that case at page 503-504, the Court states as follows.

> Quote: Similarly the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts except in those rare instances when this closure is explicitly permitted or mandated by an ethics code provision or statute. It is not the business of the lawyer to disclose publicly the secrets of the client. In any event, where the element of a

wrongful discharge in violation of public policy claim cannot, for reasons peculiar to the particular case be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege. We underline the fact that such drastic action would seldom, if ever, be appropriate at the *demurer* stage of the litigation, that is at the pleading stage. Although *General Dynamics* argues claims are barred for disclosure by the lawyer-client privilege that is an issue incapable of resolution and challenge to the facial sufficiency of the complaint.

Again, I'm making this ruling at the time on the sufficiency of the complaint.

Quote: Indeed, in most wrongful termination suits brought by in-house counsel, whether the attorney-client privilege precludes the plaintiff from recovery will not be resolvable at *demurer* stage. Rather, in the usual case whether the privilege serves as a bar to the plaintiff's recovery will be litigated and determined in

the context of other motions for protective order or to compel further discovery responses as well as at the time of the motion for summary judgment.

And then going on second:

Contours of the statutory attorney-client privilege should continue to be strictly observed.

We reject any suggestion that the scope of the privilege should be diluted in the context of in-house counsel and their corporate clients.

Members of corporate legal departments are as fully subject to the demands of the privilege as outside their colleagues.

I think that's very important language. I know the plaintiff cited this for really a different context which is the fact that courts should take an active managerial role.

But in that case, the Court is recognizing that sometimes plaintiffs may not be able to go forward with a prosecution of their wrongful discharge case, because it would require the use of privileged material.

But we're not at the stage of making any kind of determination on that here because we don't even know

what the material is, we don't know how necessary it is to the plaintiff in prosecuting their case.

But the Court makes clear and I respect and agree with it, California Supreme Court, that there's not such a special category for in-house counsel.

The fact they have certain burdens that come with being an attorney and having to respect the rules of professional conduct 1.6, the need to keep confidences and attorney-client privilege communications secret.

There are exceptions under the Michigan rule which we talked about today, they do apply in this case within the limited context of responding to the affirmative defense and possibly with a limited context of this case of dealing with whatever the defendants says is the reason for the discharge.

But the Michigan Rules of Professional Conduct 1.6 does not permit their use offensively to establish your -- the plaintiff's wrongful discharge claim. So those are the limitations that I believe apply. That's my reasoning.

And the question now then would be we do need a protective order. I've looked at the suggestions made in the defendant's brief as to which would be in a protective order, they look fairly reasonable.

But the question is do you think, in light of the

direction I've given you today, you're able to sit down and work out one.

One way we can do it is I can give you a period of time to work out one. If you can't, you can each submit one to me that reflects what I've just said as best you can. Or I can pick one of them or draft one of my own.

But I'd rather you two try, both sides, try to control the process of crafting a protective order in light of what I've just stated, in light of my findings and rulings, that you can live with and that creates a process which will allow you to, as best as possible, work through the privilege issues without coming to the court; if need be, come to the court.

MR. LENHOFF: How long will it take us to get the transcript, because I think we need the transcript.

THE COURT: That's an excellent question. Now you ask me a technical question. I'm willing to give you that, you know, whatever time that is. We can find out with a phone call probably.

I think under the existing protective order right now, Mr. Pelton, you're protected by being able to designate things as confidential. Okay.

And then -- and then I do think, based on the fact that paragraph 15 of the existing protective order seems to punt on this issue, you do need something more.

I hope I'm clear on how I see this rule, how I read this rule. It is what it is in its plain language, that's the context in which you need to move forward.

MR. LENHOFF: Once we get the transcript, I'll be able to meet with Mr. Pelton and try to fashion something.

I guess as you say, Your Honor, if we can't fashion something, if we need to submit orders, we'll give it a good faith effort.

THE COURT: I know if you will.

So the question is how much time you need because you need to get a transcript. Give us a little moment, we'll see if we can find out the answer to that. We may not be able to find out, but we'll try.

MR. PELTON: I want to respond to one thing.

We have this current production. We controlled label it and what I would propose in the interim is we let them know which documents we think are privileged and that we have at least a gentleman's agreement here you're not going to submit anything or disclose anything until you know further.

I think it goes without saying, but given the Court asked me if I thought there was adequate protection under that, I want that.

MR. LENHOFF: We'll agree to that.

THE COURT: Okay. I thought you would.

MR. LENHOFF: Could I make one point?

THE COURT: If you wish, sure.

MR. LENHOFF: I believe the Court clearly indicated that, that Mr. Smith's complaint to Mr. Bekofske which was referenced in the first-amended complaint, the actual complaint as opposed to the attachments, that's certainly not subject to any protective order. We can use that. It's Mr. Smith's employment.

I think Mr. Pelton conceded that, but he said, well, there's some attachments you might want to be able to use, but the actual complaint which is several pages that we can use.

THE COURT: Mr. Pelton, do you concede that?

MR. PELTON: May be careful. My recollection is -- I don't have my associate here with me, he's down in Judge Roberts' courtroom.

Actually is that we produced it without designating as privileged. If so, yes, if that's what we did.

My recollection is there were certain attachments we designated as privileged and provided a privilege log on those and didn't produce those. That's my recollection and my associate might know. I don't know.

And I'm not going to sit here and read the 40 page document.

THE COURT: I am not either. I haven't reviewed that complaint.

What I was remarking on your allegations in your legal complaint about those complaints made, at first blush, you know, they appear to be complaints made through an employment complaint process as opposed to communications with an attorney an client.

Obviously, Mr. Pelton, if you see within those complaints you think need to be redacted because they're privileged, you need to take that issue up. We're not talking about attachments, we're talking about actual complaint.

MR. LENHOFF: Fine.

THE COURT: It sounds like Mr. Pelton produced those to you without designating it or claiming privilege to it, so I think you can proceed on that basis.

MR. PELTON: I would agree assuming we did. Whether they did or not, this is -- this is a complaint to a complaint procedure.

THE COURT: Well, if they did designate it as confidential, then I'm not ruling on that issue because I don't have it before me, it's not been briefed.

But if they didn't, then it seems to me that your -- I just don't have that in front of me. I'm not going to rule on a document.

And as I said from the bench, I wasn't ruling on that, I was making observations that.

And it seems -- probably arguing about something we don't need to argue about because I think we're on the same page about it.

MR. PELTON: I think the hypothetical if we wanted to play it out would be it's conceivable there was in the complaint reference or discussion or quotation of the privileged conversation.

It's a very long document. You know, those could very well be redacted, that kind of thing. I don't think we had to do that here. But again I'm without my associate here confirming it, I'm not making a firm representation.

THE COURT: I will give you the direction, Mr. Pelton, since the issue's been brought up by Mr. Lenhoff it's probably worth you and your associate getting your noses into that complaint soon, so that if you see something that is of concern, you get a letter out right away asserting that privilege.

But if you haven't produced it subject to, again designated as confidential, presumably it's not.

MR. PELTON: I agree. And we did a big production and I think it was included, I'm just not sure.

THE COURT: Look at it. If you had an inadvertent waiver you're on notice that Mr. Lenhoff is taking this position and if there's an inadvertent waiver, let him know right away.

Is that satisfactory to everyone?

MR. PELTON: We did do a privilege log.

THE COURT: Presumably you would have designated it on the privilege log if you thought it was okay? So what do we know?

THE CLERK: I've no information. We need to call and find out.

(Inaudible)

MR. PELTON: Can I suggest 10 days after receipt of the transcript of it or after it gets filed? We order it within ten days of receipt. I'm not sure we need it, but if Mr. Lenhoff wants it.

THE COURT: Mr. Lenhoff, does that sound good 10 days after receipt?

MR. LENHOFF: We have 10 days to agree on an order or else provide you with our proposed order.

THE COURT: Right. And exactly. Agree on an order or give me a proposed order. And like I say, I

may pick one, meld one, or I'd write my own. I'd rather you have the first crack at it.

You know, I know practicing law, I always prefer to craft my own protective orders then have some judge who doesn't know anything do it for me. So we'll do that.

Now you have some control over how fast you're going to get that transcript, presumably by whether you pay an expedition fee, I'll go on by when you receive it.

Anything further?

MR. LENHOFF: Nothing from plaintiff.

MR. PELTON: Nothing, Your Honor.

THE COURT: Thank you very much.

(Whereupon this hearing concluded at 11:39 a.m.)

CERTIFICATE OF TRANSCRIBER

I do hereby certify that the foregoing is a correct transcription from the digital sound recording of proceedings in the above-entitled matter on the date hereinbefore set forth and has been prepared by me or under my direction to the best of my ability.

s/Carol S. Sapala, FCRR, RMR August 3, 2015